No. 12761.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACK BORCICH, ANDREW VILICICH and BORTUL ZANKICH, Co-Owners of the Oil Screw MARSHA ANN,

Appellants,

vs.

JOSEPH ANCICH, JOHN KAIZA, ANTON BOGDANOVICH, PETER SVORINICH, MARTIN MISKULIAN, RAY ZUKOWSKI, WILLIAM T. DECKER, W. H. HOOPES, NICK MILOSEVICH, GEORGE KORGAN and SAM BILAS,

Appellees.

Appeal from the United States District Court for the Southern District of California Central Division

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BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

To the Honorable, the Chief Judge and Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Statement of Jurisdiction.

This action was brought by appellees to recover for damages arising out of a collision on the high seas between the Oil Screw BEAR and the Oil Screw MARSHA ANN. Jurisdiction was conferred on the District Court by the grant of admiralty jurisdiction contained in the Constitution of the United States, Article III, Section 2,

and by Title 28, U. S. C., Section 1333, which gives the District Courts original jurisdiction over any civil cause of admiralty or maritime jurisdiction.

Judgment was entered September 14, 1950. Within 90 days and on October 26, 1950, a petition for appeal was filed pursuant to the provisions of 28 U. S. C., Section 1291, and the applicable rules of admiralty procedure as promulgated by the United States Supreme Court. [A. 72.] The appeal was allowed. [A. 72.]

Statement of the Case.

We strongly controvert appellants' summaries of testimony commencing on pages 4 and 9 of their opening brief. Appellants have lifted statements from context and have plainly used the summaries for argumentative purposes. We do not intend to answer at this point the many misrepresentations of fact and we reserve our answers for the argument which follows.

Insofar as the respective versions of appellees and appellants, which are set out at page 3 of appellants' brief, illustrate the sharply conflicting contentions of the parties, they serve their purpose. We point out that the testimony of the respective witnesses for appellees and appellants was equally conflicting.

We would like to add that this case came to trial before the Honorable James M. Carter on November 8, 9, 13, 14, and 19, 1949. It was tried without a jury and all witnesses testified in court. At the conclusion of the trial, Judge Carter found negligence on the part of the MARSHA ANN. [A. 573.] The rest of the issues were taken under submission. Judge Carter announced that he would welcome briefs discussing three points: (1) Was the BEAR guilty of any fault proximately contributing to the colli-

sion? (2) The amount of damage to the BEAR. (3) Cases or a theory under which the seamen or fishermen could recover. [A. 577.] Briefs were submitted and on May 31, 1950, Judge Carter handed down his memorandum of decision. He found in favor of appellees and against appellants on all issues taken under submission. [A. 45.] In addition, Judge Carter wrote an opinion on the right of fishermen employed on a lay plan to maintain a libel *in rem* and *in personam* in their own names against a vessel which negligently collided with a vessel on which they were employed thereby causing them to lose their share of a prospective catch of fish on that vessel. [A. 49.] This opinion was filed July 18, 1950, and was reported in 92 Fed. Supp. 929 and 1950 A. M. C. 1336.

Summary of Argument.

Appellees' argument will be briefly summarized. However, first we want to emphasize the importance of keeping in mind all the circumtances and special facts relating to this collision. Discussion of individual points in the abstract is useless and can be very misleading.

There is only one question regarding the rules to apply to this collision—does the Starboard Hand Rule apply to vessels which are not in sight of each other? Recent cases unanimously hold that it does not. Also, there is a very strong reason why it should not apply. Fog navigation demands that *both* vessels act to avoid each other.

The two decisive factors in this collision were: (1) the MARSHA ANN'S improper use of radar, and (2) the MARSHA ANN'S excessive speed. The MARSHA ANN was proceeding at excessive speed out of Los Angeles Harbor in a dense fog. At the time of the collision, she was just outside the harbor breakwater. Her radar gave

her a very clear picture of the vessels in her vicinity, including the BEAR. Notwithstanding this information, the MARSHA ANN literally shut her eyes and stood into the jaws of a collision. That is, she knowingly entered the blind area where her radar would not pick up the BEAR. The physical damage sustained by the BEAR emphatically speaks, and is uncontradictable evidence of the MARSHA ANN'S speed.

The seamanlike navigation of the BEAR stands up under close and critical scrutiny. She had a proper and efficient whistle and was sounding the proper fog signals. As she felt her way through the fog, she alternately stopped and proceeded with caution upon hearing whistles of other vessels in the vicinity. She was proceeding at a moderate speed and maintaining a proper and efficient lookout with due regard to existing conditions and circumstances. The BEAR was operated in all respects in strict compliance with the International Rules for the Prevention of Collisions at Sea. Her maneuvers in no way contributed or were related to the collision. When the MARSHA ANN emerged at excessive speed from the fog headed directly for the BEAR, there was absolutely nothing that the BEAR could do to escape.

The damages proximately resulting from the collision and the lay time were exhaustively discussed and thoroughly reviewed by the trial court. Judge Carter's award was reasonable in every respect and was amply supported by the record.

The cause of action brought by the fishermen is contemplated by Title 28 U. S. C., Section 1916. This cause of action sounds in tort and not contract, either expressed or implied, as appellees' claim. It is simply an action for damages which were foreseeeable and resulted from the negligent acts of appellants.

ARGUMENT.

I.

The Starboard Hand Rule, or Article 19 of International Rules for the Prevention of Collisions at Sea, 33 U. S. C. A. 104, Applies Only to Vessels Which Are in Sight of Each Other and Can Continually Check Each Other's Position.

Before considering the factual questions raised by this appeal, let us first determine whether or not the Starboard Hand Rule applies. All the testimony is to the effect that both vessels were enveloped in a dense fog—visibility was not over 50 or 60 feet. [A. 137, 171, 361, 379, 510.] As we understand appellants' position, they contend that Article 19 applies notwithstanding the fact that the vessels were not in sight of each other. (Br. 31.) Certainly no one would argue that anything but an *in extremis* situation existed when the BEAR and the MARSHA ANN came out of the fog and sighted one another at a distance of 20 to 50 feet.

Appellants cite four cases for the proposition that the Starboard Hand Rule applies to vessels navigating in a fog. (Br. 31.) In his book on *Collision,* 1949, p. 328, John Wheeler Griffin, an eminent Proctor in Admiralty, refers to these four cases as, "clearly wrong on principle."

It is true that at the time these cases were decided, the dates run from 1885 to 1903, there was some confusion on the point. However, the confusion that once existed has since been clarified. Appellants' counsel apparently has overlooked the more recent cases which have uni-

formly held that the Starboard Hand Rule does not apply to vessels not in sight of one another.

United States v. The Australian Star, 171 F. 2d 472 (2d Cir., 1949);

Publicover v. Alcoa S. S. Co., 168 F. 2d 672 (2d Cir., 1948);

Erie R. Co. v. The Invader, 159 F. 2d 648 (2d Cir., 1947);

Lind v. U. S. 156 F. 2d 231 (2d Cir., 1946);

The Anglo-Saxon Petroleum Co. v. U. S., 88 Fed. Supp. 158 (D. C. Mass., 1950).

This recent group of cases actually is a consequence of war conditions; that is, vessels operating blacked out. However, the principle is the same as that enunciated in *The Grenadier,* 74 Fed. 974 (E. D. Pa. 1896), wherein the court, in considering the Starboard Hand Rule, held that it "clearly contemplates navigation under ordinary circumstances, where the vessels can see each other and thus ascertain their respective courses. Its application is impossible where the vessels are enveloped in dense fog, unable to see each other or to ascertain their respective location and bearings."

There is a very strong reason why the Starboard Hand Rule should not be applied to vessels enveloped in a fog. Every mariner knows and appreciates the difficulty of judging the direction from which sound comes in a fog. The Starboard Hand Rule requires one of the vessels to hold her course and speed. Assuming that one of the vessels could tell she was privileged, it would still be an intolerable and impossible obligation to place upon that vessel. Further, it directly conflicts with Article 16 which provides that a vessel "hearing, apparently forward of her

beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over." The import of Article 16 is well known to the courts, armiralty proctors and mariners.

Fog navigation demands that *each* vessel shall reduce speed to the point where she can stop in her share of the visible distance and that *each* vessel shall stop when she hears a whistle forward of her beam and then proceed cautiously, *both* taking such action to avoid collision as circumstances dictate.

II.

The Faults of the Marsha Ann Were Plain, Flagrant and Inexcusable; and Were the Sole and Only Cause of the Collision.

A. The Marsha Ann Did Not Make Proper Use of Her Radar.

In reading appellants' opening brief we were struck with appellants' absolute failure to discuss or even mention what we consider to be a vital factor in this case—the MARSHA ANN'S failure to properly use her radar.

At the conclusion of the trial, Judge Carter made certain remarks, which left us with the impression that such failure and the MARSHA ANN'S excessive speed were decisive. [A. 572-577.] We feel that this collision cannot be intelligently discussed without taking both of these factors into account. Discussing individual points in the abstract is useless, because in a collision case all of the circumstances bearing on the collision are relevant and important.

The testimony of Bortul Zankich, radar operator aboard the MARSHA ANN, vividly described the part radar played in this collision. [A. 421-445.] Briefly summarizing: the MARSHA ANN was equipped with a Raytheon model S. O. -1 radar. It was working well at the time of the collision. In fact, the radar operator describes from his observations of the radar scope a very clear picture of the vessels in the vicinity, and particularly ahead of the MARSHA ANN. [A. 425.] Among other vessels the BEAR was plainly in "radar sight." [A. 377, 429.] All this information was being passed to the captain who was on the bridge. [A. 376, 429.] Notwithstanding this clear grasp of the situation, and the obvious fact that she was on a collision course with the BEAR, the MARSHA ANN literally shut her eyes and stood into the jaws of a collision.

We feel that the MARSHA ANN'S fault is comparable to that of the BARRY in the case of *Barry v. Medford,* 65 Fed. Supp. 622 (E. D. N. Y. 1946). The BARRY had entered a fog bank at 18 knots. Her radar was not put in operation. About two minutes after entering the bank, she struck the fishing trawler MEDFORD on the starboard side just forward of amidships. The court found the BARRY solely at fault in spite of the absence of a lookout on the MEDFORD, and her use of an improper fog signal. At page 626 the court said:

> "The failure of the Barry to use her radar is the most serious and sinister aspect of these causes. The perfection of that device is thought to have invoked a new concept of the responsibilities attaching to vessels so equipped, touching their handling and operation in or near a fog-bound area * * *."

"[T]he offending ship could have informed herself of the presence and track of the Medford in abundant time to have avoided by a wide margin any danger whatever of striking her. Under such circumstances it is impossible to yield to the argument for the Barry that her conduct is to be condoned to any extent, in view of her failure to employ the very device which was installed to prevent a collision."

The Barry was running blind at all times. She did not know that the Medford or any other vessel was in the vicinity. The Marsha Ann had the information and then knowingly ran blind. That is, notwithstanding the knowledge of the captain and radar operator that the Marsha Ann's radar could not pick up the Bear at less than 200 yards, she maintained a steady course and proceeded into the blind area. [A. 377, 422, 442.] It is incomprehensible that a vessel would deliberately proceed in a dense fog at considerable speed on a collision course—a course which would take her within the minimum 200 yards radar range, and cause her to run blind in dangerous proximity to another vessel.

As Judge Carter pointed out, the Marsha Ann did not take any steps to avoid the collision, such as reversing her engines or coming to a stop. [A. 575; Finding VI, A 63.] The most that can be said for the Marsha Ann is that she disengaged her engine sometime before the collision. [A. 572.] There was another seamanlike maneuver open to the Marsha Ann. As soon as she cleared the breakwater, she could have hauled off to starboard and stood well clear of the Bear and the boat which was one or two points on her starboard bow. [A. 425.] The relative bearings of these boats were reported when the Marsha Ann was headed in a southeast direction

[A. 425.] Hence, she had plenty of sea room to the southwest. By promptly hauling off to starboard the MARSHA ANN could have kept the three boats, which were ahead, in radar sight at all times and missed them by the proverbial "mile."

The *Hindoo-Australian Star,* 74 Fed. Supp. 145 (S. D. N. Y., 1947), Affd. 172 F. 2d 472 (2d Cir., 1949), emphasizes that improper use of radar will not be condoned. The United States District Court, for the Southern District of New York, in holding the AUSTRALIAN STAR at fault for not using the information which was available on her radar, had this to say:

> "* * * It has been suggested that to hold the Australian Star at fault is to penalize her because of her equipment with radar. That is a misconception. The conduct which is regarded as negligent upon the part of a person of sound vision is not the same as that which is condemned when practiced by the blind. *The fault of the Australian Star is that she chose to remain blind when she had the means to see.*
>
> "Prudent navigation involves taking advantage of all of the safety devices at hand. * * *" (Emphasis added.)

Clearly the MARSHA ANN violated Article 29 of International Rules for the Prevention of Collisions at Sea, or as it is commonly known, The Rule of Good Seamanship, which provides:

> "Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals or of any neglect to keep a proper lookout, or *of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.*" (Emphasis added.)

B. The Marsha Ann's Speed at the Time of Sighting the Bear Was Excessive and Unwarranted.

Appellants have lifted two sentences from Judge Carter's remarks at the end of the trial as a basis for building an argument that the MARSHA ANN was dead in the water when the collision occurred. (Br. 39-40.) However, Judge Carter's very next paragraph completely shatters appellants' argument. We quote: "I think that the motors of the MARSHA ANN were not turning at the time of the collision. However, I think the MARSHA ANN at the time of the collision was sliding through the water fast enough to constitute negligence on the part of the MARSHA ANN, together with all the other circumstances of the case." [A. 572.]

It is true that appellants' witnesses were all claiming that the MARSHA ANN had been stopped for 5 to 7 minutes, was dead in the water, drifting, etc. [A. 362, 378, 382, 426, 494.] But the plain fact is that Judge Carter did not believe those statements. [A. 575.] Rather, he relied on the less dogmatic answers of appellees' witnesses and the uncontradictable physical damage to the BEAR.

Three of appellees' witnesses state that the MARSHA ANN had a bow wave when she came out of the fog at 50 feet. [A. 139-40, 267, 289.] When pressed to estimate the speed of the MARSHA ANN, appellees' witnesses guessed that it was anything between two to six knots. [A. 139, 176, 216, 253.] The difficulty of estimating the speed of a vessel coming out of a fog at 50 feet is granted. The physical damage sustained by the BEAR

as the result of the blow from the MARSHA ANN speaks for itself and is the best evidence. [A. 319-23.]

In an attempt to explain away the physical damage to the BEAR, appellants have concocted a completely fantastic theory. They maintain that the BEAR, on sighting the MARSHA ANN, turned hard port thereby swinging her stern into the MARSHA ANN'S stem and causing the damage. (Br. 40-41.) Not only does the watch on the BEAR say that her rudder was not put over or her course changed [A. 141, 172-73, 216], but that theory just does not jibe with realities. It is physically impossible.

In the first place, there was not time to put the rudder over and have it catch. There were only a few seconds from the time of sighting until the collision—at the most 10 seconds. [A. 151, 172, 216.] Not only does it take time to turn the wheel itself but even after the rudder is over, it must catch. [A. 533-34.] At reduced speeds, a vessel answers the helm very slowly. [A. 182.]

Secondly, the point of impact was near, if not forward, of the BEAR'S pivoting point. When the rudder catches, a ship turns or pivots around a point which is referred to as the pivot point. The stern, of course, kicks away from the direction of the turn. The pivot point varies with different ships and their condition of load. Normally, the pivot point is slightly forward of amidships. If the vessel is down by the stern, the pivot point moves aft. In this case, the BEAR was returning with a load of fish and would be down by the stern, hence her pivot point would

be aft. It is unlikely that there was any swing amidships where the MARSHA ANN hit the BEAR. [A. 142, 172, 288.]

There is no escaping that the MARSHA ANN was proceeding at an excessive speed when she emerged from the fog, a speed which gave the BEAR no chance whatever to escape.

C. The Marsha Ann Was Not Sounding the Proper Fog Signals and She Did Not Sound the "Correct" Danger Signal.

Appellants state that there is no "dispute" about the MARSHA ANN sounding the proper fog signals and the "correct" danger signal. (Br. 41.) We dispute it. Article 15(b) of the *International Rules* provides for a two-blast signal only by a vessel "having no way upon her." Merely stopping the engine is not enough. See *Griffith on Collision,* 1949, p. 342. Also, we question whether the MARSHA ANN gave the "correct" danger signal since the International Rules do not require or provide for a danger signal. See *Griffith on Collision,* 1949, p. 222. Farwell, *The Rules of the Nautical Road,* 2d Ed. 1944, pp. 59, 81.

We point this out only to clear the record. These whistle signals did not contribute to the collision. The sole and direct cause of the collision was the MARSHA ANN's excessive speed and her failure to use her radar properly.

III.

The Alleged Faults of the Bear Are Not Established or Supported by the Record.

Appellants have practically taken a blanket exception to every finding of fact pertaining to the navigation and operation of the BEAR, and they have indicated that they would rely on all of them. (Br. 13.) Many of these exceptions have been glossed over or omitted entirely from appellants' argument, unless we are to make inferences. Notwithstanding, we are inclined to discuss fully every point appellants raise in this appeal. However, that would practically involve re-trying the case and, of course, we appreciate that such is prohibitive. Therefore, we shall confine ourselves to discussing what we believe to be the salient points and will otherwise answer appellants as briefly as possible, keeping in mind the scope of appellate review of factual findings in a non-jury proceeding.

We feel that the rule which restricts setting aside findings of fact by the trial judge is particularly applicable in this case. All the witnesses testified in open court. The testimony was most contradictory. There was a great deal of language difficulty because none of the witnesses possessed a satisfactory command of the English language. And especially, the trial judge was in the best position to observe and to pass on the credibility of each witness.

We merely refer to the "rule" because we are a little in doubt as to whether to state the Ninth Circuit Admiralty Appellate Rule in terms of "strong presumption" or "clearly erroneous." In *Wilmington Transp. Co. v. Edwards,* 95 F. 2d 283 (9th Cir., 1938), at 284, Circuit Judge Denman stated, "While this admiralty appeal is a trial *de novo,* the presumption in favor of the findings of the District Court is at its strongest, since the trial judge heard

all the witnesses, save one, and his deposition clearly sustains those heard." More recently, the Ninth Circuit, in admiralty cases, has omitted all reference to a "trial *de novo*" and has referred to the "clearly erroneous" test of Rule 52(a), Federal Rules of Civil Procedure, 28 U. S. C. A.; *Compania Naviera Limitada v. Black,* 183 F. 2d 388, 391 (9th Cir., 1950); *Blake v. W. R. Chamberlin & Co.,* 176 F. 2d 511, 512 (9th Cir., 1949). See also *Smyth, C. I. R. v. Barneson,* 181 F. 2d 143, 144 footnote 2 (9th Cir. 1950).

Apparently, the distinction which once existed between civil and admiralty factual review has been abolished in the Ninth Circuit. As a practical matter, it is questionable whether a difference ever actually existed. Appellate review is a nebulous concept and escapes precise definition. The important thing in all cases is that appellant must show clearly that the trial court erred. As pointed out above, there are particularly strong reasons in this case for according the trial judge's findings the greatest weight possible.

A. The Bear Had a Proper and Efficient Whistle and Was Sounding the Proper Fog Signals.

We cannot help but feel that all this discussion regarding the BEAR's fog signals is moot. The purpose of sounding fog signals is to put vessels in the vicinity on notice of the presence of the sounding vessel. The MARSHA ANN had a far better indication on her radar of the BEAR's position than she could ever hope to get from a fog signal. The radar also showed that the BEAR was moving and that is all the information the MARSHA ANN could possibly get from a fog signal.

Further, it appears that for some unknown reason no one on the MARSHA ANN heard the BEAR's fog signals. The"beep-beep" which Borcich heard [A. 378] certainly was not the BEAR's whistle, which was a practically new air whistle and made a loud sound. [A. 224, 556.] Under the circumstances it is hard to see how the BEAR's fog signals had any connection with the accident.

However, we would like to point out that the BEAR was not "merely answering the whistles of other vessels" as appellants say. (Br. 19.) The testimony of the BEAR's watch was direct and positive to the effect that the signal of a prolonged blast was being given at intervals of not more than two minutes, as required by the applicable rules. Additionally, there was testimony that answering signals were given by the BEAR as she was feeling her way along. [A. 175, 193, 195, 209-10, 214-15, 222, 231-32, 556.]

Article 15 of the International Rules sets the maximum interval for sounding fog signals. Not only is it permissive to signal more frequently but under certain circumstances good seamanship requires it. Farwell, in *The Rules of the Nautical Road,* 2d Ed., 1944, p. 198, says: "When a vessel, sounding proper signals, while navigating in Long Island Sound, turned into an occupied anchorage, she was found at fault for not increasing the frequency of her whistles to warn vessels already at anchor. And so when vessels are feeling their way past each other in a dense fog, there can be little doubt that legal obligation, as well as good seamanship, may require signals to be given every few seconds until both vessels are past and clear." Farwell cites *The Quivilly,* 253 Fed. 415 (E. D. N. Y., 1918), in support of this statement.

The cases which appellant cites (Br. 19-22) can all be distinguished on their facts. Either there was no signal at all or there was no regulation signal sounded or the vessel was using a fog horn when she should have been using a whistle.

B. The Bear Was Proceeding at a Moderate Speed With Due Regard to Existing Conditions and Circumstances.

Appellants seek to attack the trial court's finding that at the time of the collision the BEAR was virtually dead in the water and that the BEAR was not traveling at excessive speed under the circumstances. (Br. 23.) Appellants also state: "The District Court erred when it found: Sixth: (1) That at the time of the said collision the BEAR was proceeding at a speed of about one to one and one-half miles per hour." (Br. 23.) We believe that appellants' paraphrasing of the court's finding is not accurate. With regard to the one and one-half knot's speed, the court found: "Whistles of other vessels were heard in the vicinity of the BEAR as a result of which the BEAR alternately stopped and then proceeded with caution at a speed of approximately one and one-half miles per hour." [Finding V, A. 63.] At the time of the collision the BEAR was virtually dead in the water. [Finding V, A. 63.]

Appellants' argument is predicated on an average speed from Oceanside to San Pedro. (Br. 23-5.) The computations are based on a number of assumptions such as the time and point of departure, the speed the BEAR made over the ground, and when the BEAR reduced her speed. None of these factors are accurately known. Obviously no inference can be drawn from such a calculation.

The testimony of the BEAR's crew was all to the effect that immediately prior to the collision the BEAR was barely maintaining steerageway and that she was alternately stopping and then proceeding with caution at a speed of approximately one and one-half knots. [A. 137, 171, 240, 252.]

Appellants' argument on pages 25 to 26 of their brief does not make any sense because it fails to take two very important facts into account: (1) the speed of the MARSHA ANN, and (2) the angle from which the MARSHA ANN approached. According to everyone on the BEAR, the MARSHA ANN was headed directly for the BEAR's green light when she first loomed out of the fog at 50 feet. Therefore, if the BEAR had stopped dead in her tracks, the MARSHA ANN would still have hit the BEAR. As it turned out, the BEAR advanced about 8 to 12 feet and the MARSHA ANN struck approximately 10 to 12 feet aft of the green running light. [A. 140, 141, 157, 171-72, 288.] It is manifest that the BEAR's speed was moderate and had nothing whatsoever to do with the collision.

C. The Bear Was Maintaining a Proper and Efficient Lookout.

We have no quarrel with the general statements of law contained in the various opinions quoted by appellants on pages 27 to 30 of their brief. However, the circumstances and particular facts of each case must be considered. General principles cannot be applied at random. For example, appellants cite and quote from *The Sagamore,* 247 Fed. 743 (1st Cir. 1917). The Sagamore was 430 feet in length. The lookout was in the crow's nest some 60 feet above the water and 70 feet aft of the stem. The BEAR's lookouts were approximately 15 feet above the

water and about 20 feet abaft the stem. In *The Tillicum,* 230 Fed. 415 (9th Cir. 1916), the lookout was inside the pilot house. The BEAR's lookouts were stationed on an open platform with visibility all around. [A. 146.]

We would also like to call attention to one general principle not mentioned by appellants. As stated by Circuit Judge Swan in *Rice v. United States,* 168 F. 2d 219 (2d Cir. 1948) at page 1013: "It is well settled that the absence of a lookout is not material where the presence of one would not have availed to prevent the accident." See also *Griffith on Collision,* 1949, pp. 284-86. We point out this rule to emphasize the fact that an individual case can only be decided in the light of existing circumstances.

As a fact, however, we submit that the BEAR had a proper and efficient lookout. True there was no lookout stationed at the bow. However, there were five men on the open bridge [A. 146] and one man standing on deck on the starboard side [A. 136] who were looking and saw the MARSHA ANN. Boganovich testified he was stationed as a lookout on the open bridge with no other duties to perform and that he was looking out for other vessels. [A. 287.] We will not debate whether it was preferable to have a lookout on the open bridge or on the bow, although we do not believe that this is an open and shut case for stationing a man on the bow. See *Wilmington Transp. Co. v. Edwards, supra.* Actually, a man stationed on the bow of the BEAR would not have been as close to the MARSHA ANN as the men on the open bridge were when she emerged from the fog because of the angle of approach.

The very best evidence, however, of the efficiency of the BEAR'S crew as lookouts is the fact that they picked up the MARSHA ANN at 50 to 60 feet, the maximum visibility [A. 137, 171, 215, 250, 287], whereas the men on the MARSHA ANN only picked up the BEAR at 20 to 25 feet. [A. 361, 379, 510.]

D. The Bear Alternately Stopped and Proceeded With Caution Upon Hearing Whistles in the Vicinity.

We can find only one sentence in appellants' entire argument which discusses how the trial court erred in the above finding. (Br. 32-35.) Even that sentence is gross speculation and obviously wrong. We refer to the sentence on page 35 of appellants' brief: "If the BEAR had stopped her engines upon hearing the said signals and if the MARSHA ANN was traveling at the rate of speed claimed by the appellees, the MARSHA ANN would have passed the point of collision and the collision would not have occurred."

The whole argument is devoted to spelling out the importance of Rule 16 and to proving that the MARSHA ANN approached from an angle forward of the BEAR'S beam. We agree with appellants on both of those points. The important thing is that Judge Carter found that the BEAR was stopping and proceeding with caution when she heard the whistle signal of another vessel in the vicinity. [Finding V, A. 63.] There was substantial evidence to support this finding. [A. 171, 240, 252.]

IV.

The Damages Awarded Appellees Were Reasonable, and Certainly Not Excessive.

Appellants contend that damages were allowed for repairs not necessitated by the collision. (Br. 36-38.) They say that certain of the BEAR's frames had to be replaced because of dry rot or old breaks and not because of the collision. Appellants also refer to non-collision repairs in places other than the frames, namely "the bilge area" and "many other breaks". (Br. 37.) We have reviewed the Apostles carefully, and particularly appellants' references. [A. 453, 488, 489.] As we read the testimony of Appellants' surveyor, he was discussing dry rot, breaks and non-collision damage in the frames only.

We call attention to the fact that the trial court already has deducted from the damages allowed, the cost of repairing all ninety frames, or $3600.00. This is all spelled out in Judge Carter's Memorandum of Decision, filed May 31, 1950. [A. 47.]

The damages proximately resulting from a collision, the repairs which are necessary and the period of lay-up are impossible to establish with certainty. As appellants' surveyor put it, what should be repaired and what resulted from the collision are largely a matter of opinion. [A. 550.] He also added that opinions could differ between competent surveyors of equal caliber. [A. 550.]

The damages incurred by the BEAR, the caliber of the yard making the repairs, and the time necessary to effect repairs were exhaustively discussed and reviewed by the trial court. Surveyors for both parties appeared and testified at great length. [A. 301-350, 446-493, 534-555.] The damage to the BEAR has been summarized by Mr. Simms, her surveyor. [A. 319-323.]

It is obvious that the BEAR took a crushing broadside blow from the MARSHA ANN, a vessel some six times heavier than the BEAR. This blow wracked the BEAR from stem to stern and from topside to keel. Even the garboard strakes were sprung. [A. 323.] The damages allowed for the cost of repairing the BEAR and the lay-up time were reasonable and certainly not excessive.

V.

The Trial Court Properly Awarded Damages to the Fishermen for the Loss of Their Prospective Share in the Fish Catch.

A. Finding of Damages for Fishermen Is Sustained by the Evidence and Stipulations.

Appellants argue (Br. 49) that there was "no evidence whatsoever" for or on behalf of libelants Ray Zukowski and William T. Decker "proving or even tending to prove that they were damaged in any manner whatsoever."

The fisherman appellees respectfully call the attention of the Court to the following:

1. The stipulation of the respondents before the lower court [A. 159-161], states:

> "Mr. Fall: Well, this must be in. That he (Decker) attempted to get other employment during the period of time that the Bear was laid up for repairs, but he was unable to get employment. The reason was that other men had been employed for the season and there was no opening.
>
> Mr. Callaway: Oh, I will stipulate he would so testify if he was called. So stipulated, that if he was called he would so testify.
>
> "Mr. Fall: So stipulated.

The Court: At least he was not an eye witness.

Mr. Callaway: No.

The Court: All right, so stipulated. Can we then take an adjournment at this time, then?"

2. Joseph Ancich testified with reference to Ray Zukowski [A. 279]:

"Q. Do you remember Ray Zukowski? A. You mean the guy that lives at Tacoma?

Q. Yes. A. Yes, I know him.

Q. Did he accompany you at any time on these attempts to seek employment? A. Well, I used to go down to the call at Kello, down to 6. I saw him there every once in a while, a day, and he ask me once couple of dollars. I don't know I give him any money.

Q. Do you know whether or not he was seeking employment? A. I don't think he was working.

Q. Did you see him try to get a job? A. Yes, I see him try to get a job. He was down on slip, and on Terminal Island, trying to get a job. I don't think he have a job when I saw him."

3. The stipulation was entered into between the representative Proctors for all the litigants in the action. This Stipulation is attached to the Motion of the Appellees for Dimunition of the Record on Appeal. It provides, on pages 3 and 4 thereof, as follows:

"Whereas, the parties to the action have now agreed, and by these presents stipulate that the following amounts are correct and may be found due the libelants and intervening libelant owners against the respondents for the matters and things and in the amounts herein set forth:

1. That the prospective catch which the Vessel "Bear" would have made, and for which damage is

allowable, for the period of thirty-eight (38) days which the Court found to be the reasonable lay-up time for the bids and repairs to the vessel "Bear", would have been two hundred seventy (270) tons;

2. That the price per ton was Fifty Dollars ($50.00), making a total loss of catch in the amount of Thirteen Thousand Five Hundred Dollars ($13,-500.00);

3. That the crew members of the Vessel "Bear" were fishing on a lay of sixty-eight percent (68%) for the crew and thirty-two percent (32%) for the vessel;

4. That the intervening libelants, GEORGE KORGAN and SAM BILAS, be awarded the sum of Four Thousand Three Hundred Twenty Dollars ($4,320.00) against the respondents as damages for the loss of use of their vessel "Bear" for the period of thirty-eight days;

5. That the sum of Nine Thousand One Hundred Eighty Dollars ($9,180.00) be awarded the libelants and the intervening libelants GEORGE KORGAN, NICK MILOSEVICH, and W. H. HOOPES, against the respondents in equal shares of Nine Hundred Eighteen Dollars ($918.00) each as and for loss of their fishing time."

The Stipulation above set forth is conclusive and binding upon the appellees. By such Stipulation, they agreed and consented to the Findings and Decree of the lower court to damages in the amounts set forth in the Decree in favor of the libelants and intervening libelants, which sums the appellees agreed were due as the result of the loss of fishing time by libelants and intervening libelants, which sums the appellees agreed were due as the result

of the loss of fishing time by libelants and intervening libelants Korgan, Milosevich and Hoopes.

The record shows that intervening libelant Hoopes made around $500.00 during the period the BEAR was laid up for repairs. [A. 144.] In the preparation of the Findings of Fact and Conclusions of Law and the Final Decree, libelants took into consideration this sum and consented that the respondents were entitled to a reduction in the sum that was Stipulated to be due the intervening libelant Hoopes.

B. Fishermen May Maintain an Action for Wages Without Prepayment of Costs.

Appellants argue (Br. 42) that the court erred in finding the allegations of Article I of the original libel are true. This article alleges as follows:

> "The libelant is a seaman, within the designation of persons permitted to sue herein without furnishing bond for or prepayment of, or making deposit to secure fees and costs for the purpose of entering in and prosecuting suits conformable to the provisions of Title 28, Sec. 1916, U. S. C. A."

The law with reference to fishermen-seamen maintaining an action for wages without prepayment of costs as provided in Title 28, U. S. C. , Section 1916, is now settled in this Circuit.

> *Cekalovich v. Ruljanovich,* 142 F. 2d 430 (9th Cir., 1944).

The libel included a cause of action for maintenance. The damages sustained by the seamen herein were the wages they lost by reason of the negligent act of the "MARSHA ANN" and its owners. It would seem not to

alter the right of the seaman by reason of the fact that the wages became due by someone, not his employer, by reason of the negligent act of the person liable.

If any one of the members of the crew of the "BEAR" had been injured in the collision and had lost his anticipated wages by reason thereof, it certainly could not be argued that he could not maintan an action for his lost anticipated wages, against the "MARSHA ANN."

Section 1916 of Title 28 is liberally construed in favor of seamen, who are wards of admiralty.

> *Grant v. U. S. S. B. E. F.*, 24 F. 2d 812 (2nd Cir., 1928).

C. The Fishermen Have a Cause of Action for Loss of Anticipated Wages.

The case of *Robins Dry Dock & Repair Co. v. Flint*, 275 U. S. 303, 48 S. Ct. 135, 72 L. Ed. 290 (1927), relied upon by appellants is not in point. The Robins Dry Dock & Repair Co., had a contract with the owners of the S. S. "BJORNEFJORD" to repair her. The owners of the "BJORNEFJORD" under a Charter party with a third party, had the obligation to repair her. The Supreme Court succinctly stated the issues in that case as follows:

> "The present libel 'in cause of contract and damage' seems to have been brought in reliance upon the allegation that the contract for dry docking between the petitioner and the owners 'was made for the benefit of the libellants and was incidental to the aforesaid charter party,' etc. But it is plain, as stated by the Circuit Court of Appeals, that the libellants, respondents here, were not parties to that contract 'or in any respect beneficiaries' and were not entitled to

sue for a breach of it 'even under the most liberal rules that permit third parties to sue on a contract made for their benefit.' 13 F. (2d) 4.

"Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must at least show that it was intended for his direct benefit."

In the case at bar, there was no contractual relationship between the "BEAR" and the "MARSHA ANN." The fishermen are not suing for damages resulting from the breach of any contract made between third parties under which they were claiming as beneficiaries.

In the case at bar there was a negligent act by the "MARSHA ANN." This negligent act caused a loss by the fishermen. This loss was foreseeable by the tort-feasor, and was found by the court to be a fact.

This court held in *Van Camp Sea Food Co. v. Di Leva,* 171 F. 2d 454 (9th Cir., 1948), that fishermen could maintain an action against the tort-feasor for their loss in the prospective catch.

In the present case, it was contended by the "MARSHA ANN" that the "BEAR" was solely at fault, and the negligence of the "BEAR" was the direct cause of the collision. If the respondents in the lower court had been able to prove their contention, then the owners of the "BEAR" would have been liable to the fishermen libelants for their loss of the prospective catch. With such a situation, the logical conclusion is that the libelants below, should have

had the owners of the "BEAR" bring an action against themselves for the benefit of their employees. It would have been directly analogous to the situation appearing in *Van Camp Sea Food Co. v. Di Leva, supra.*

If the fishermen have a cause of action for loss of the prospective catch, shall it be left to the owners of the vessel upon which they are employed, to determine the ultimate liability of the parties? The action might never be brought by the owners of a vessel, in behalf of their seamen, when there is a contention that there is either sole or mutual fault on their behalf.

If a seaman has a cause of action, is there any reason why he may not maintain the same in his own name? All of the fishermen were before the court in this action. There was no possibility of a multiplicity of actions.

In *Lind v. U. S.,* 61 Fed. Supp. 329 (E. D. N. Y. 1945), the fishermen members of the crew of a fishing vessel were permitted to bring an action in their own names. In this case the court found mutual fault, and a decree was made in favor of the fishermen libelants for full damages against both the vessel that collided with them, and against their own vessel.

Judge Carter, in his comprehensive decision in the case at Bar, ably dispels the inequities claimed by the appellants herein. His decision reads, in part, as follows:

> "In *The Mary Steele, supra* [Fed. Cas. No. 9226, D. C. Mass. 1874], the owners and the crew were both parties to the libel and in *The Columbia, supra*

[Fed. Cas. No. 3025], the report of the commissioner, exceptions to which were overruled, allowed 'the seamen who libeled for their share, 1/6 of the catch so estimated.' These two cases, although not sustaining the right to a cause of action in the crew alone, throw doubt upon the broad statement contained in the Laflin case 'that neither the officers nor members of the crew may join with the owners in a recovery of the proceeds of a voyage.'

"It has long been recognized that the admiralty courts in the administration of justice, deal liberally with seamen. Seamen are the special wards of admiralty because of the nature of their services and its accompanying dangers. (Benedict on Admiralty, 6th Edition, Sec. 621.) The maritime courts having jurisdiction over seamen, have for generations made every effort to protect their rights and interests. Admiralty rules of pleading are to be liberally construed and in dealing with sailors' rights, admiralty will grant them relief if justice is served, and adjudge their rights where equity and expediency are gained. While an admiralty court does not have general equitable jurisdiction, it acts upon equitable principles and should give relief where a court of equity would relieve, and a court of law would not."

Benedict on Admiralty, 6th Edition, Sec. 223;

Watts v. Camors, 115 U. S. 353, 6 S. Ct. 91, 29 L. Ed. 406 (1885);

U. S. v. Cornell Steamboat Co., 202 U. S. 184, 26 S. Ct. 648, 50 L. Ed. 987 (1906);

Van Kamp Sea Food Co. v. Di Leva, 171 F. 2d 454 (1948).

"In *Van Kamp Sea Food Co. v. Di Leva, supra,* the sharesmen were allowed to maintain a libel for loss of earnings due to the lay up for repairs of their vessel from a collision caused by the negligent navigation of another vessel also owned by their employer. But the right of action was allowed the fishermen because the respondent owned both boats. The Court reasoned that the respondent could not be expected to sue itself for the benefit of the fishermen, hence the action was allowed on equitable principles. Judge Denman cut through legal form and procedure, and said in substance: Since the fishermen in justice and equity have an ultimate claim to their prospective share of the catch, then they may maintain a cause of action in their own names.

"In equity and justice, why should the recovery of loss of profits by seamen serving under the lay plan be contingent on the action taken by their employer?

"These fishermen have suffered serious damage as a result of the collision. They have no right of recovery against their master or the owner of the boat unless he be at fault. *Reed v. Hussey* (1836), Fed. Cas. No. 11646. Their 'contract of employment' is terminated by the operation of maritime law upon the breaking up of the voyage as a result of the collision. *The Elk,* 1938 A. M. C. 714. To refuse them the right to sue in their own names, places them at the whim and caprice of their employer and may involve conflicting interests."

Why? Why in the name of law and equity—should a fisherman—not under the disability of minority or incompetency, be deprived of the right to maintain an action in his own name, for damages that he has sustained? It was stipulated that the fishermen did sustain damage. Does admiralty or equity deprive the seaman of the right to maintain an action for these damages? Is the foundation of the former law of procedure based upon a premise not present in the case at bar? If the fishermen have a cause of action, then why may they not maintain the same in their own names? If they have sustained damages, is there any reason in sound law and equity—and especially for these wards of admiralty—which holds that they may not protect and enforce their own rights?

We do not here have a case where the seamen are scattered to the four winds and are unable to enforce their rights, or even where only a portion are present.

In *U. S. v. Laflin,* 24 F. 2d 683 (9th Cir., 1928), at 685, the court said:

> "We find no difficulty in sustaining the trial court's conclusion that the owners *could* bring the action as representing the crew, and that within the meaning of the statute the latter *might* 'submit their claim' through him, and *might* sue him for damages if he neglected to prosecute the same." (Emphasis added.)

It appears that the court felt that there was the permissive ability, and possibly mandatory, for the owners to sue. The exclusive right of the master to maintain the

action on behalf of the crew may be the law in the whaling industry, and in *U. S. v. Laflin, supra,* but where is the foundation for such law in the case of men fishing for sardines on the lay for the prospective catch?

The case of *Taber v. Jenny,* Fed. Cas. No. 13,720 is cited by the court in *U. S. v. Laflin, supra,* as authority for the law that the Master must bring suit for the seamen. In this case, the vessel had already caught the whale, which was the property of the vessel. The crew had no property right in the whale. The owner was the proper party to bring the action. The fishermen had no interest therein. They had an interest in the proceeds of the whale that was the property of the vessel and its owners. The case is not authority for the proposition that fishermen may not sue in their own names for the wages they would have earned from the prospective catch.

In *United States v. Laflin, supra,* the court cites *Baxter v. Rodman,* 3 Pick. 435, and *Grozier v. Atwood,* 4 Pick. 234, for the proposition that the crew cannot sue for proceeds of the voyage. Both of these cases are actions *in assumpsit* for a portion of a catch already made. Neither case involves an action sounding in tort for a share of the anticipated catch. The dictum in the cases relying on *Taber v. Jenny, supra., United States v. Laflin, supra, Baxter v. Rodman, supra,* and *Grozier v. Atwood, supra,* as authority for the proposition that a crew member may not join in an action for a recovery of his loss of wages is of no authority for the question before the present court.

Conclusion.

When all the facts and circumstances bearing on this collision are considered, analyzed and weighed, it is certain that the collision was caused by two things: (1) the MARSHA ANN's improper use of radar, and (2) the MARSHA ANN's excessive speed. The navigation of the BEAR is unassailable, and she was operating in compliance with the International Rules for the Prevention of Collisions at Sea. The most critical seaman could not say that her maneuvers or signals contributed in any way to the collision.

The damages awarded by the trial court were reasonable. A cause of action sounding in tort has been made out by the fishermen for the loss of their prospective share in the fish catch.

The findings and decree of the District Court, holding the MARSHA ANN solely at fault for the collision are completely substantiated by the record. The decree should be affirmed, with costs to appellees.

Respectfully submitted,

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